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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jul 19, 2023

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PHILLIP R.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY ADMINISTRATION,

Defendant.

No. 4:22-CV-05151-SAB

**ORDER REVERSING DECISION OF  
COMMISSIONER**

Plaintiff brings this action seeking judicial review of the Commissioner of Social Security's final decision denying his application for social security benefits. Plaintiff is represented by Chad L. Hatfield. The Commissioner is represented by Heidi Triesch, Sarah Moum, and Brian M. Donovan. Pending before the Court are Plaintiff's Opening Brief, ECF No. 12, the Commissioner's Brief, ECF No. 16, and Plaintiff's Reply Brief, ECF No. 17.

After reviewing the administrative record, briefs filed by the parties, and applicable case law, the Court is fully informed. For the reasons set forth below, the Court reverses the Commissioner's decision.

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**ORDER REVERSING DECISION OF COMMISSIONER ~ 1**

1       **I.       Jurisdiction**

2       On January 21, 2020, Plaintiff filed an application for Title II disability  
3 insurance benefits and an application for Title XVI application for supplemental  
4 security income, and with an onset date of May 1, 2019. Plaintiff's applications  
5 were denied initially and on reconsideration. Plaintiff requested a hearing. On  
6 December 8, 2021, a telephonic hearing was held. Plaintiff appeared and testified  
7 before an ALJ, with the assistance of his counsel, Chad Hatfield. K. Diane Kramer,  
8 Vocational Expert (VE) also participated. The ALJ found that Plaintiff was not  
9 disabled on December 28, 2021.

10       Plaintiff requested review by the Appeals Council, and the Appeals Council  
11 denied the request on September 30, 2022. The Appeals Council's denial of review  
12 makes the ALJ's decision the "final decision" of the Commissioner of Social  
13 Security, which this Court is permitted to review. 42 U.S.C. § 405(g),  
14 1383(c)(1)(3). Plaintiff filed a timely appeal on November 30, 2022. ECF No. 1.  
15 The matter is before this Court pursuant to 42 U.S.C. § 405(g).

16       **II.      Five-Step Sequential Evaluation Process**

17       The Social Security Act defines disability as the "inability to engage in any  
18 substantial gainful activity by reason of any medically determinable physical or  
19 mental impairment which can be expected to result in death or which has lasted or  
20 can be expected to last for a continuous period of not less than twelve months." 42  
21 U.S.C. § 423(d)(1)(A), 1382c(a)(3)(A). A claimant shall be determined to be under  
22 a disability only if their impairments are of such severity that the claimant is not  
23 only unable to do their previous work, but cannot, considering claimant's age,  
24 education, and work experiences, engage in any other substantial gainful work that  
25 exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). The  
26 Commissioner has established a five-step sequential evaluation process to  
27 determine whether a person is disabled in the statute. *See* 20 C.F.R.  
28 § 404.1520(a)(4)(i)–(v), 416.920(a)(4)(i)–(v).

1       **Step One:** Is the claimant engaged in substantial gainful activities? *Id.*

2       § 404.1520(a)(4)(i), 416.920(a)(4)(i). Substantial gainful activity is work done for  
 3 pay and requires compensation above the statutory minimum. *Keyes v. Sullivan*,  
 4 894 F.2d 1053, 1057 (9th Cir. 1990). If the claimant is engaged in substantial  
 5 activity, benefits are denied. *Id.* § 404.1520(b), 416.920(b). If the claimant is not,  
 6 the ALJ proceeds to step two.

7       **Step Two:** Does the claimant have a medically-severe impairment or  
 8 combination of impairments? *Id.* § 404.1520(a)(4)(ii), 416.920(a)(4)(ii). A severe  
 9 impairment is one that lasted or must be expected to last for at least 12 months and  
 10 must be proven through objective medical evidence. *Id.* §§ 404.1509, 416.909. If  
 11 the claimant does not have a severe impairment or combination of impairments, the  
 12 disability claim is denied. *Id.* §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the  
 13 impairment is severe, the evaluation proceeds to the third step.

14       **Step Three:** Does the claimant's impairment meet or equal one of the listed  
 15 impairments acknowledged by the Commissioner to be so severe as to preclude  
 16 substantial gainful activity? *Id.* § 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the  
 17 impairment meets or equals one of the listed impairments, the claimant is  
 18 conclusively presumed to be disabled. *Id.* § 404.1520(d), 416.920(d). If the  
 19 impairment is not one conclusively presumed to be disabling, the evaluation  
 20 proceeds to the fourth step.

21       Before proceeding to the fourth step, the ALJ must first determine the  
 22 claimant's residual functional capacity (RFC). An individual's residual functional  
 23 capacity is their ability to do physical and mental work activities on a sustained  
 24 basis despite limitations from their impairments. *Id.* § 404.1545(a)(1),  
 25 416.945(a)(1). The RFC is relevant to both the fourth and fifth steps of the  
 26 analysis.

27       **Step Four:** Does the impairment prevent the claimant from performing work  
 28 they have performed in the past? *Id.* § 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the

1 claimant is able to perform their previous work, they are not disabled. *Id.*  
 2 § 404.1520(f), 416.920(f). If the claimant cannot perform this work, the evaluation  
 3 proceeds to the fifth and final step.

4 **Step Five:** Is the claimant able to perform other work in the national  
 5 economy in view of their age, education, and work experience? *Id.*  
 6 § 404.1520(a)(4)(v), 416.920(a)(4)(v). The initial burden of proof rests upon the  
 7 claimant to establish a *prima facie* case of entitlement to disability benefits. *Tackett*  
 8 *v. Apfel*, 108 F.3d 1094, 1098 (9th Cir. 1999). This burden is met once a claimant  
 9 establishes that a physical or mental impairment prevents him from engaging in her  
 10 previous occupation. *Id.* At step five, the burden shifts to the Commissioner to  
 11 show that the claimant can perform other substantial gainful activity. *Id.*

### 12 **III. Standard of Review**

13 The Commissioner's determination will be set aside only when the ALJ's  
 14 findings are based on legal error or are not supported by substantial evidence in the  
 15 record as a whole. *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir. 1992) (citing  
 16 42 U.S.C. § 405(g)). Substantial evidence is "more than a mere scintilla,"  
 17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971), but "less than a preponderance,"  
 18 *Sorenson v. Weinberger*, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). Substantial  
 19 evidence is "such relevant evidence as a reasonable mind might accept as adequate  
 20 to support a conclusion." *Richardson*, 402 U.S. at 401.

21 A decision supported by substantial evidence will be set aside if the proper  
 22 legal standards were not applied in weighing the evidence and making the decision.  
 23 *Brawner v. Secr'y of Health & Human Servs.*, 839 F.2d 432, 433 (9th Cir. 1988).  
 24 An ALJ is allowed "inconsequential" errors as long as they are immaterial to the  
 25 ultimate nondisability determination. *Stout v. Comm'r, Soc. Sec. Admin.*, 454 F.3d  
 26 1050, 1055 (9th Cir. 2006). The court must uphold the ALJ's denial of benefits if  
 27 the evidence is susceptible to more than one rational interpretation, one of which  
 28 supports the decision of the administrative law judge. *Batson v. Barnhart*, 359 F.3d

1 1190, 1193 (9th Cir. 2004). It “must consider the entire record as a whole,  
2 weighing both the evidence that supports and the evidence that detracts from the  
3 Commissioner’s conclusion, and may not affirm simply by isolating a specific  
4 quantum of supporting evidence.” *Revels v. Berryhill*, 874 F.3d 648, 654 (9th Cir.  
5 2017) (quotation omitted). “If the evidence can support either outcome, the court  
6 may not substitute its judgment for that of the ALJ.” *Matney*, 981 F.2d at 1019.

7 **IV. Statement of Facts**

8 The facts have been presented in the administrative record, the ALJ’s  
9 decision, and the briefs to this Court. Only the most relevant facts are summarized  
10 here.

11 At the time of the alleged onset Plaintiff was 41. He is obese. In May 2019,  
12 he became really depressed and thought about committing suicide. He went to  
13 community health, and he was able to receive counseling. He experiences periods  
14 of irritability, agitation, and has angry outbursts. He assaulted his daughter’s  
15 boyfriend during one outburst. His medications cause him to become dizzy and  
16 blackout. He also experiences swelling in his legs and shortness of breath. He  
17 testified that when his legs swell, he must sit down and elevate his feet above his  
18 heart for two hours. This can occur up to three times a day. He reports he can stand  
19 for about 15 minutes before the swelling causes him to sit and elevate his legs. He  
20 testified that he is limited to walking about 200 feet before he gets winded. He uses  
21 a nebulizer, and he also uses an emergency inhaler when his breathing becomes  
22 labored.

23 Plaintiff had been a heavy smoker, but at the time of his hearing, he was  
24 down to a handful of cigarettes a day. He testified that he is scared to attempt any  
25 type of full-time work because of the possibility of blacking out or hurting himself.

26 **V. The ALJ’s Findings**

27 The ALJ issued an opinion affirming denial of benefits. AR 15–27. At step  
28 one, the ALJ found that Plaintiff has not engaged in substantial gainful activity

1 since May 1, 2019, the alleged onset date. AR 18.

2 At step two, the ALJ identified the following severe impairments: restrictive  
3 lung disease, chronic bronchitis, sleep apnea, lumbar degenerative disc disease,  
4 obesity (BMI 48-53), ADHD, mood disorder, anxiety disorder, binge eating  
5 disorder. AR 18.

6 At step three, the ALJ found that Plaintiff did not have an impairment or  
7 combination of impairments that meets or medically equals the severity of one of  
8 the listed impairments. AR 21.

9 The ALJ concluded that Plaintiff has an RFC to perform:

10 a full range of light work as defined in 20 CFR 404.1567(b) and  
11 416.967(b) except: he can stand and walk 4 hours total in combination  
12 in an 8-hour workday; he cannot climb ladders, ropes, or scaffolds; he  
13 can occasionally balance, stoop, kneel, crouch, crawl, and climb  
14 ramps and stairs; he cannot have concentrated exposure to pulmonary  
15 irritants or hazards (e.g., unprotected heights, moving mech parts); he  
16 is limited to superficial contact with the public and coworkers, with no  
17 more than occasional collaborative tasks; and he requires a routine,  
18 predictable work environment with no more than occasional changes.

19 AR 20.

20 At step four, the ALJ found that Plaintiff was not capable of performing past  
21 relevant work. AR 25.

22 At step five, the ALJ found there were other jobs that existed in significant  
23 numbers in the national economy that Plaintiff could also perform in the national  
24 economy, including representative positions such as small parts assembler, collator  
25 operator, and an office helper. AR 26. Consequently, the ALJ found that Plaintiff  
26 was not disabled.

## 27 VI. Discussion

### 28 A. Step Two Analysis

29 The ALJ erred in finding that Plaintiff's lower extremity edema was not a  
30 severe impairment. An impairment or combination of impairments may be found

1 “not severe only if the evidence establishes a slight abnormality that has no more  
 2 than a minimal effect on an individual's ability to work.” *Webb v. Barnhart*, 433  
 3 F.3d 683, 686 (9th Cir. 2005) (citation omitted). The record amply demonstrates  
 4 that Plaintiff has chronic lower extremity edema and was required to elevate his  
 5 legs when resting. AR 561, 607, 609, 612, 617, 620, 637, 641, 707, 735, etc. The  
 6 ALJ failed to even discuss whether the edema was nonsevere. Instead, the ALJ  
 7 found that generally upon physical examination he had no edema. This is simply  
 8 not true. This error was not harmless as there is no indication that any limitations  
 9 caused by Plaintiff's edema were considered by the ALJ in the sequential analysis.

10 **B. Evaluation of the Medical Opinions**

11 Plaintiff argues the ALJ erred by grossly mischaracterizing the treatment  
 12 record and rejecting the disabling opinions of treating physician Dr. Lakhani and  
 13 examining physician Dr. David-Boozer without properly considering their  
 14 supportability or consistency. The Court agrees.

15 In evaluating medical opinion evidence, the ALJ considers the  
 16 persuasiveness of each medical opinion and prior administrative medical finding  
 17 from medical sources. 20 C.F.R. § 416.920c(a), (b). The ALJ is required to  
 18 consider multiple factors, including supportability, consistency, the source's  
 19 relationship with the claimant, any specialization of the source, and other factors  
 20 (such as the source's familiarity with other evidence in the file or an understanding  
 21 of Social Security's disability program). *Id.* § 416.920c(c)(1)–(5). Supportability  
 22 and consistency of an opinion are the most important factors, and the ALJ must  
 23 articulate how they considered those factors in determining the persuasiveness of  
 24 each medical opinion or prior administrative medical finding. *Id.* § 416.920c(b)(2).  
 25 The ALJ may explain how they considered the other factors, but is not required to  
 26 do so, except in cases where two or more opinions are equally well-supported and  
 27 consistent with the record. *Id.*

28 Supportability and consistency are further explained in the regulations:

1 (1) *Supportability.*

2 The more relevant the objective medical evidence and supporting  
 3 explanations presented by a medical source are to support his or her medical  
 4 opinion(s) or prior administrative medical finding(s), the more persuasive  
 the medical opinions or prior administrative medical finding(s) will be.

5 (2) *Consistency.*

6 The more consistent a medical opinion(s) or prior administrative medical  
 7 finding(s) is with the evidence from other medical sources and nonmedical  
 sources in the claim, the more persuasive the medical opinion(s) or prior  
 administrative medical finding(s) will be.

8 *Id.* §§ 404.1520c(c); 416.920c(c).

9       a. **Dr. Lakhani**

10 Dr. Lakhani is Plaintiff's treating physician. Dr. Lakhani opined that  
 11 Plaintiff suffers from COPD, asthma, osteoarthritis, morbid obesity, right hip pain,  
 12 right knee pain, chronic shortness of breath, and lower extremity tenderness; (2) he  
 13 must lie down and elevate his legs throughout the day due to lower extremity  
 14 swelling; (3) his osteoarthritis is reasonably likely to cause pain; (4) he would miss  
 15 three days per month if he attempted to work a 40-hour per week schedule; (5) he  
 16 is limited to light work; and (6) he would be expected to be off task and  
 17 unproductive 12-20% of the time.

18 The ALJ found that Dr. Lakhani's opinions were only partially persuasive  
 19 because a checkbox form was used with minimal explanation and was poorly  
 20 supported. The ALJ found Dr. Lakhani's comment that Plaintiff would require  
 21 time during the day to lie down vague, meaningless, unpersuasive, and not  
 22 consistent with the record. The ALJ erred in its evaluation of Dr. Lakhani's  
 23 opinion. Dr. Lakhani treated Plaintiff. As early as March 2021, Dr. Lakhani noted  
 24 that Plaintiff experienced swelling in his lower legs. Thus, the need for Plaintiff to  
 25 lie down and elevate his feet due to lower extremity edema was well-documented  
 26 and not vague.

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b. Dr. Davis-Boozer

In January 2021, Dr. Davis-Boozer concluded that Plaintiff could stand/walk a maximum of two hours and he would not be able to do any active job at all until his conditions were well-treated. The ALJ found that Dr. David-Boozer's opinion was an outlier. The ALJ believed Plaintiff's extreme shortness of breath was not demonstrated in other exams.

The ALJ erred in evaluating Dr. Davis-Boozer's examination. Dr. Davis-Boozer supported his opinion by evaluating Plaintiff and reviewing medical records that reflect that Plaintiff suffers from shortness of breath. Dr. Davis-Boozer noted that Plaintiff was "obviously short of breath throughout [the] entire exam, even at rest, even after five minutes of rest;" that Plaintiff could not complete a full sentence without stopping to take a breath and that Plaintiff was unable to lay down flat more than 15 seconds. Dr. Davis-Boozer noted that Plaintiff had one plus pitting edema. These observations support Dr. Davis-Boozer's opinion.

Also, the record reflects that Plaintiff's shortness of breath and swelling was getting progressively worse. Dr. Davis-Boozer's evaluation reflect the worsening of Plaintiff's symptoms. Rather than an outlier, Dr. Davis-Boozer's opinion is supported by observations and a review of medical evidence. Dr. Davis-Boozer's opinion is consistent with the record that reflects Plaintiff's worsening physical condition. Dr. Davis-Boozer's opinion that Plaintiff is unable to meet the demands of sedentary work due to acute shortness of breath, even when sitting/lying down and on exertion is consistent and supported by the examination findings, and the ALJ erred in finding it was not persuasive.

### **C. Plaintiff's Subjective Complaints**

Plaintiff argues the ALJ erred in discounting his subjective symptoms of his physical and mental health conditions.

In determining whether a claimant's testimony regarding subjective pain or symptoms is credible, the ALJ engages in a two-step analysis. *Garrison*, 759 F.3d

1 at 1014. “First, the ALJ must determine whether the claimant has presented  
2 objective medical evidence of an underlying impairment which could reasonably  
3 be expected to produce the pain or other symptoms alleged.” *Id.* (citation and  
4 quotation omitted). If the claimant satisfies the first step of the analysis, and there  
5 is no evidence of malingering, the ALJ can reject the claimant’s testimony about  
6 the severity of their symptoms “only by offering specific, clear and convincing  
7 reasons for doing so.” *Id.* (citation and quotation omitted). “This is not an easy  
8 requirement to meet: The clear and convincing standard is the most demanding  
9 required in Social Security cases.” *Id.* (citation and quotation omitted). That said, if  
10 the ALJ’s credibility finding is supported by substantial evidence in the record, the  
11 Court may not engage in second-guessing. *Thomas v. Barnhart*, 278 F.3d 947, 959  
12 (9th Cir. 2002).

13 In assessing Plaintiff’s credibility, the ALJ made the following observations:  
14 (1) Plaintiff engaged in minimal mental health treatment; (2) he continued smoke  
15 cigarettes and marijuana; (3) he had health insurance; (4) engages in daily living  
16 activities that are in tension with his symptom allegations, including taking care of  
17 his children.

18 The ALJ’s observations are not true, and therefore cannot be clear and  
19 convincing reasons for discounting Plaintiff’s testimony. A closer review of the  
20 record reveals that Plaintiff did engage in weekly counseling sessions throughout  
21 2019-20. Those sessions reflect that Plaintiff struggled with his anger and outbursts  
22 toward family members. Plaintiff significantly reduced the number of cigarettes to  
23 around three a day. At some point, Plaintiff lost health insurance and it affected his  
24 care. As such, these are not clear and convincing reasons for finding that Plaintiff’s  
25 statements regarding his limitations are not supported by the record.

26 The ALJ also failed to identify any activities that are inconsistent with  
27 Plaintiff’s disabling testimony. There is not sufficient evidence in the record,  
28 including the age and needs of the children, to find that caring for children is

1 inconsistent with his testimony, as the evidence suggests that his children are at  
 2 least school age.

3 **D. Lay Witness Testimony**

4 The ALJ considered Plaintiff's wife's functional report, which indicated that  
 5 she needed to help Plaintiff bathe, dress, and use the toilet because he cannot  
 6 adequately reach, and he gets out of breath. An ALJ is permitted to discount a lay  
 7 witness' testimony when it is substantially similar to the claimant's testimony and  
 8 the ALJ has properly discounted the claimant's testimony. *See Valentine v.*  
*9 Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 694 (9th Cir. 2009).

10 The ALJ erred in failing to account for his wife's testimony. It was  
 11 consistent with Plaintiff's testimony as well as consistent with the longitudinal  
 12 record, especially when considering that Plaintiff's impairments were getting  
 13 increasingly worse.

14 **E. Obesity**

15 In November 2021, Dr. Lakhani indicated that Plaintiff's obesity  
 16 complicated critical activities of daily living, including difficulties using the  
 17 restroom on his own, and causing his arthritis in his back and knees to worsen. Dr.  
 18 David-Boozer identified that Plaintiff has some component of Obesity  
 19 Hypoventilation Syndrome. In May 2021, Dr. Cunanan noted that testing showed  
 20 restrictive lung disease which Dr. Cunanan suspected was due mainly to obesity.

21 The ALJ erred in failing to account for the difficulties caused and  
 22 exacerbated by his obesity in determining Plaintiff's RFC. Here, the record  
 23 indicates that Plaintiff's obesity exacerbated his impairments, and, more than  
 24 likely, is causing his impairments, including edema and shortness of breath.  
 25 Consequently, Plaintiff's edema, shortness of breath and obesity cause limitations  
 26 that are not accounted for in the RFC.

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1       **VII. Conclusion**

2       The ALJ erred in failing to properly weigh and consider the medical opinion  
3 evidence and Plaintiff's and Plaintiff's wife's testimony. The RFC failed to  
4 account for Plaintiff's edema and the need to elevate his legs during the day. It also  
5 failed to account for the fact that Plaintiff experiences shortness of breath upon  
6 exertion and even while sitting. As such, ALJ's RFC assessment does not account  
7 for the full extent of Plaintiff's functional limitation and cannot support the ALJ's  
8 disability determination. If the ALJ incorporated these limitations in Plaintiff's  
9 RFC, the ALJ would be required to find Plaintiff on remand. *See Harman v. Apfel*,  
10 211 F.3d 1172, 1178–79 (9th Cir. 2000). Since it is clear from the record Plaintiff  
11 is unable to perform gainful employment and no additional proceedings are  
12 necessary, remand for an award of benefits is necessary. *See Benecke v. Barnhart*,  
13 379 F.3d 587, 596 (9th Cir. 2004).

14       Accordingly, **IT IS HEREBY ORDERED:**

15       1. For docket purposes, Plaintiff's Opening Brief, ECF No. 12, and  
16 Reply Brief, ECF No. 17, are **GRANTED**.

17       2. For docket purposes, the Commissioner's Response Brief, ECF No. 16,  
18 is **DENIED**.

19       3. The decision of the Commissioner is **REVERSED** and **REMANDED**  
20 for an immediate award of benefits.

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1       4. Judgment shall be entered in favor of Plaintiff and against Defendant.  
2       **IT IS SO ORDERED.** The District Court Executive is hereby directed to file  
3 this Order, provide copies to counsel, and **close** the file.  
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5       **DATED** this 19th day of July 2023.  
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8       Stanley A. Bastian  
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10      Stanley A. Bastian  
11      Chief United States District Judge  
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